LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 14 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 51

UNITED STATES OF AMERICA,

Petitioner,

v.

ARNO SASCHA JAKOBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

HERMAN ADLERSTEIN,
Counsel for Respondent.

INDEX

	PAGE
Questions Presented	1
Statute Involved	2
Statement	2
ARGUMENT:	
I. The decision below is clearly correct	6
II. This case is so different from the Seeger case that there is no good reason to grant certiorari or to join in these cases	8
III. There is no conflict of decision between the Circuit Courts of Appeal	10
Conclusion	12

Citations

CASES:

Berman v. U. S., 156 F. 2d 380, 9 Cir. 5, 7, 10

Macintosh v. U. S., 283 U. S. 631 7

Peter v. U. S., 324 F. 2d 173, 9 Cir. 10, 11

U. S. v. Seeger, 326 F. 2d 846, 2 Cir. 8, 9

STATUTES:

50 U. S. C. App. 456(j), Universal Military Training and Service Act, 62 Stat. 611 ..... 2, 7, 8, 9, 11

50 U. S. C. App. 451(c) 2

REGULATION:

32 C. F. R. 1626.25 4

IN THE

Supreme Court of the United States

October Term, 1963

No. 937

UNITED STATES OF AMERICA,

Petitioner,

v.

ARNO SASCHA JAKOBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

Questions Presented

1. Whether the recommendation of the Department of Justice to the Appeal Board, that respondent was not opposed to participation in war by reason of religious training and belief, but that his claim was based on a personal moral code, was erroneous as a matter of law.

2. Whether respondent qualified as a conscientious objector under the definition given in Section 6(j) of the Universal Military Training and Service Act, and whether Section 1(c) of the Act should be used in connection with such definition.

3. Whether the 1-A classification was without basis in fact.

4. Whether Section 6(j) is constitutional, if the definition of a conscientious objector meant to exclude from recognition the views stated by respondent in his claim for conscientious objector status.

Statute Involved

Section 1(c) of the Universal Military Training and Service Act, 50 U. S. C. App. 451(c) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy".

The pertinent provisions of Section 6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. 456(j), are set forth in the Petition at page 2.

Statement

Respondent registered with his local board on September 2, 1953 at the age of 18 years and filed Selective Service Questionnaire, Form 100 (GX 3), the same day. Not being a conscientious objector at that time, respondent did not sign Series 14 which is a paragraph allowing statement of a conscientious objector claim. Respondent noted in Series 15, that he had a physical disqualification resulting from a back injury (GX 3p 10). Respondent was classified in 1-A on September 17, 1953 (GX 2), 2-S on March 31, 1955, 1-A in July 1955, 2-S on September 8, 1955 and 1-A on February 9, 1956, after he had left school (GX 2, 16). On February 27, 1958 respondent was found acceptable for military service, and his local board notified him to that effect on March 26, 1958 (GX 3 p11) (Page 3 of the Petition mistakenly states the notice was given

April 18, 1958.) Medical certificates concerning respondent's back condition were sent to the local board (GX 4-6, 18), and the army processing documents recited respondent's back condition (GX 19).

On April 18, 1958, respondent requested Form 150 for the first time (GX 21). The Department of Justice erroneously said respondent had requested said form 150 on the date of notification of selection for induction (GX 40 p3), and this is where Petitioner got the wrong date mentioned above. About six months before the local board ordered respondent for a pre-induction physical examination, he asked the clerk of the local board what was necessary for one to be recognized as a conscientious objector: She replied one had to have a long and overtly provable pacifist background, and had to have letters from ministers (GX 45 p4(2)). She added, that to qualify one must belong to one of several accepted pacifist religions and must submit proof that he had belonged to such a religion a long time (21a). For that reason, respondent made no further inquiry regarding his conscientious objector claim, until after he had passed the physical examination. On further inquiry, a Quaker organization informed respondent, that he had a valid conscientious objector claim, and he filed it.

Respondent subjoined to Form 150 an extended explanation of his views (GX 24). In it, respondent said he believed in a Supreme Being. He said the Supreme Being is higher than man or the Creator of Man, that he knows nothing of the nature of the Supreme Reality (Supreme Being) other than the fact that such Reality does exist. He knows this existence through faith. Since respondent doesn't know the nature of the Supreme Being or Reality, his religious quest lies in seeking knowledge about man who was created by the Supreme Reality, and in searching for moral standards which his divinely-given reason can accept. He says man must be spiritual, and that he is partly akin to the Supreme Reality. It is this

belief that causes him to ascribe dignity and worth to each individual. He said Life represents all that man is ever given in an ultimate sense, all else is arranged and created by man. Life is sacred and higher than all other values, and no man ought wilfully sacrifice another's life. His conscientious objections are based on these convictions (GX 24 Ser. II).

Respondent read books of Remarque, Koestler, Fromm, Dostoevski, and the well-known religious leaders, Tolstoi and Gandhi.

Although respondent had requested deferment from combatant service in Form 150, at his hearing before the local board on December 9, 1958 he offered a 43 page statement expanding his conscientious objector views and saying he could no longer accept non-combatant service (GX 31, 32). Respondent refers to Godness in this 43 page statement, but the general import of that word is that it is a quality of the Supreme Being.

After the hearing, the local board found respondent sincere, made a finding that the claim wasn't based on religious training and belief, because it was based essentially on a sociological or philosophical view or at most on a merely personal moral code (GX 33), and it classified respondent in 1-A-O for non-combatant service. In a summary of the local board hearing, the government appeal agent said: "The members of the Board were satisfied that he was honestly and properly a case for 1-A-O * * *" (GX 35).

Form 150 (GX 24), respondent's 43 page statement (GX 32) and the Exhibit I before the hearing officer on appeal showed respondent's belief in a Supreme Being. The District Court, in its opinion, referred to respondent not belonging to a sect (45a) and there was a like reference on sentencing (34a). The Appeal Board made a preliminary finding on May 4, 1959 under 32 CFR 1626.25

that "It has specifically considered the registrant's claim for deferment based on his religious training and belief and finds no merit in the registrant's appeal on that ground" (GX 38). It then sent the case to the Department of Justice for investigation and hearing. The FBI report was all favorable to the CO claim (GX 41). One reference believed registrant to be of a religious nature (GX 41 p2), while another reference said registrant has said: "All religion should object to war and killing" (GX 41, p3). After a hearing, the hearing officer reported respondent wasn't opposed to participation in combatant or non combatant military training and service by reason of his religious training and belief, but that his claim was based on a personal moral code. It also said he wasn't sincere in his claim. The Department of Justice recommended that the claim be not sustained (GX 40). A copy of the recommendation was sent to respondent and he replied (GX 45) stating he was sincere and had a religious position. The appeal board classified respondent in 1-A (GX 46) and the Director of Selective Service refused to take further action (GX 47). The Court below would have found respondent sincere in his claim, if it had to decide that originally, but held it was for the Board to decide (Pn 15).[1]

The opinion of the Court below referred to *Berman* v. *U. S.*, 156 F. 2d 380, 9 Cir. (Pn 21). The 1948 Act and amendments of it adopted the interpretation of religious training and belief, as stated in the *Berman* case. The Court below showed the Court which decided *Berman* would have recognized respondent's CO claim. It said: "We are by no means certain that the Court that rejected *Berman's* claim because his evidence showed no belief in a 'supreme power' of any kind would have rejected Jakobson's" (Pn 21). As a second reason, it added there was need to read the statute broadly because of the Constitu-

[1] Pn refers to the Petition for Certiorari.

tional question. The Court below equated respondent's beliefs with those of Prof. Paul Tillich (Pn 21-23). Note 6 of the opinion below says respondent comes closer to a traditional reading of "Supreme Being" than Tillich in one respect, namely, his acceptance of the notion of an original creator and Supreme existence. The opinion also said: "For we rule it an erroneous construction of the statute to conclude that Jakobson's beliefs fell outside its definition of religion" (Pn 15).

ARGUMENT

I.

The decision below is clearly correct.

The Court below found respondent believed in a Supreme Being (Pn 13). At the hearing before the local board, respondent said even noncombatant service would result in "too many situations and relationships that would be a strain on my conscience * * *" (Pn 13). The Court below wrote "For we rule it an erroneous construction of the statute to conclude that Jakobson's beliefs fell outside its definition of religion" (Pn 15). This decision was correct in view of the Court's findings of Jakobson's belief in a creator or ultimate cause and his belief in a horizontal relationship with God which requires direct dealing with life, death, health, love, time—the "givens" of existence (Pn 16). Thus we have duties arising through a relationship to God and superior to those arising from a human relation. Jakobson adopts the position of Acceptance, which sees in all humanity "Godness"—the quality of having been created by the Ultimate Cause. The taking of human life is incompatible with Acceptance of the world and life (Pn 17). Here again is a superior duty. The Court below called the definition of 'religious training and belief' somewhat unusual for a statute (Pn

17), and it quoted Chief Justice Hughes' statement of religion as given in *Berman* v. *U. S.*, 156 F. 2d 377 which also said: "philosophy and morals and social policy without the concept of Deity cannot be said to be religion in the sense of that term as it is used in the statute". Justice Hughes' definition of religion and the *Berman* rejection of philosophy, etc. plus the concept of Deity were incorporated in the 1948 Act (Pn 19). There is implicit in the *Berman* holding that philosophy, morals and social policy with the concept of Deity are religion within the Act. In other words, beliefs without a concept of Deity are not considered religious, while beliefs with such a concept are. The Act itself shows that, because *section 6(j)* says religious training and belief do not include "essentially" political, sociological, or philosophical views or a "merely" personal moral code. (Quotes by undersigned.) The words "essentially" and "merely" are used to denote there is no concept of Deity behind the views or code. There could have been no other reason to use these words.

The Court below said the statute doesn't require belief in an anthropomorphic Deity, breathing over the face of the waters. It added the *Berman* case 156 F. 2d at p. 380 asked only that one asserting religious belief should not 'assign all beyond (our logical equations) as a great vacancy' but should entertain a belief "going beyond the physical revelations of life", and that *Macintosh* v. *U. S.*, 283 U. S. at p. 631 said "our regard from the beginning for freedom of conscience", * * * was not intended to define "religion" or "God" in any narrow sense". The Court thought Jakobson's beliefs fit within the *Berman* definition of religion, for it said it wasn't certain that the Court that rejected Berman's claim because his evidence showed no belief in "a supreme power" of any kind would have rejected Jakobson's claim (Pn 21). It is clear from these statements, that the Court below construed Jakobson's beliefs as coming within *section 6(j)* without re-

gard to any constitutional question. The constitutional confrontment was added as a second reason.

The Court below equated respondent's beliefs with those of the great theologian, Paul Tillich, some of whose views were adopted by the Bishop of Woolwich (Pn 21-23). These views certainly belong within the definition of *sec. 6(j)*. It was in view of the resemblance of respondent's religion to that of Tillich, that the Court thought it would possibly infringe the Constitution, to hold that such a religion would not be recognized over against the well-known religions. If Congress meant to exclude Tillich's religion (this would include Jakobson's) it would then be preferring well-known religions over the religion of an outstanding theologian whose views were accepted by many people throughout the world. This would infringe the Constitution. While all this is so, the Court had found enough in Jakobson's religion to qualify it for recognition under *sec. 6(j)*. (Pn 21), even without taking into account the grave constitutional question.

II.

This case is so different from the *Seeger* case that there is no good reason to grant certiorari or to join these cases.

The principle decided in *U. S.* v. *Seeger*, 326 F. 2d 846 2 Cir. was that inclusion of the definition of religious training and belief in *sec. 6(j)*, so as to require belief in a Supreme Being, made unconstitutional so much of the Act (SPn 6).[2] That principle has no relation to the point decided at bar, because respondent believed in a Supreme Being and raised no question regarding this belief, except that his belief came within the meaning of the statute. In fact, Jakobson said he had religious training and belief, because he believed in a Supreme Being. As a sec-

[2] SPn refers to the Petition in the *Seeger* case.

ond ground, the Court below held the Statute might be unconstitutional, if it meant to exclude views of Jakobson and Tillich (Pn 23). Note 6 of the opinion below (Pn 23) says Jakobson came closer to a traditional reading of Supreme Being than Tillich, thus showing the Court had found Jakobson believed in a Supreme Being. Unconstitutionality might result in giving preference to other religions with beliefs in a Supreme Being. This was different from *Seeger* which held the Supreme Being clause had no place in the Act (SPn 27).

While respondent agrees with the decision in *Seeger*, it doesn't follow that these cases should be joined, or that certiorari should be granted here.

There is no question of the permissible scope of Congress' power to deal with persons under *sec. 6(j)* here. The question is whether Jakobson met the requirement of belief in a Supreme Being, and this was a question on interpretation of the Act, which the Court below correctly decided.

Seeger refused to answer categorically, whether or not he believed in a Supreme Being (SPn 4); his beliefs were based on his rational decision that war is undesirable (SPn 9). The Court below in *Seeger* told why he was denied CO recognition: "It is immediately apparent from a reading of the Department's report that its decision rested entirely on the finding that Seeger's objections, however sincere, were not based upon 'a belief in a relation to a Supreme Being', as required by *sec. 6(j)* of the Act" (SPn 17). Also, in *Seeger*, the Government had argued in the Court of Appeals, that Congress was seeking to "give the greatest possible latitude in the free exercise of religion when it enacted the conscientious objector provisions; since the Constitution does not require that a similar freedom be afforded the exercise of nonreligious beliefs, it is reasonable to distinguish between them" (SPn 23). Thus the government in the *Seeger* case was arguing in favor of Jakobson and against *Seeger*, and this

makes clear that the two cases do not belong together, and that the granting of certiorari in *Seeger* does not require like consideration in *Jakobson*.

III.

There is no conflict of decision between the Circuit Courts of Appeal.

The Government is in error in asserting, that in *Peter* v. *U. S.*, 324 F. 2d 173, the 9th Circuit sustained denial of an exemption to a registrant whose beliefs were substantially similar to those of respondent here. The reason for the error is that the requirement of belief in a Supreme Being was not met by Peter, while it was met by Jakobson. Therein lies the vast difference in the cases. Both Peter and Jakobson were against participation in war, but Peter's objection wasn't grounded within the terms of the statute. This is made clear in the opinion in *Peter* v. *U. S.*, 324 F. 2d 173 at p. 177, where the 9th Circuit said:

> "It is significant that nowhere in the record of the proceedings before the administrative bodies did appellant manifest clearly and unequivocally a belief in a Supreme Being to Whom he owed obedience. When asked directly, 'Do you believe in a Supreme Being?' he answered, 'It depends on the definition * * *'"

The Court then goes on to show, that Peter's position was similar to that of *Berman* in *Berman* v. *U. S.*, 156 F. 2d 381, 9 Cir. in that his philosophy, morals and social policy without the concept of Deity cannot be said to be religion in the sense of that term, as it is used in the Statute. In other words, had Peter believed in a Deity, his position of conscientious objection would have been recognized. As the Court below at bar said: "We are by no means certain that the Court that rejected Berman's claim because his evidence showed no belief in 'a supreme power' of any kind would have rejected Jakobson's" (Pn 21).

This points out the distinction between Jakobson and Berman with Peter. The Court below pointed out, that Jakobson was unlike Berman, while the 9th Cir. which decided Berman indicated, that Peter was like Berman. It follows that the Government can't be right in maintaining, that the beliefs of Jakobson and Peter were substantially alike.

No stretching of the language of *sec. 6(j)* is necessary to bring Jakobson's beliefs within its definition. Since Jakobson believed in a Supreme Being, his conscientious objector claim naturally falls within the definition of conscientious objector, as intended by Congress. As for Peter, the hearing officer reported, that he told him that belief in a Supreme Being was required, and at no time did Peter suggest that he had a belief in a Supreme Being. *Peter* v. *U. S.*, 324 F. 2d 173 at p. 175, note 3. See also the Court's statement on this at pages 176 and 177 of the *Peter* case.

The "Memorandum for the United States" in the *Peter* case at page 8 says Jakobson had an uncommon belief in a Supreme Being and there was an absence of any "duties superior to those arising from any human relation" in his creed. Both of these statements are in error. Jakobson's beliefs were grounded in a Supreme Being whom he called the Supreme Reality and Who created man (GX 24 Ser. II). He also said man was spiritual and was akin to the Supreme Reality. The fact is that respondent said he did believe in a Supreme Being. He then said he called the Supreme Being a Supreme Reality Who created man. To say that the change of use of the terms Being and Reality, under these circumstances, made the meaning different is to trifle with words. The Bible says God created man in his own image. That is just what respondent has said. There is nothing uncommon in such a belief. It was Jakobson's belief that certain things such as "life" were given by the Supreme Reality, while other things were created by man. He says life is fundamental to everything that has to do with

health, love and reason, and that life is sacred. No man ought wilfully to take another's life, and this attitude stems from his most sacred convictions. His conscientious objections are based on these convictions (GX 24 Ser. II pp. 2, 3). Such beliefs stem from Jakobson's belief in God's creation of life and life's sacredness. They prevent him from taking life. They do show superior duties to those arising from any human relation. In addition, Jakobson believed in a horizontal transcendental relation to the Supreme Reality, and this caused him to say: "And a man who says: 'I will not allow myself to be inducted into the armed services because of the way I feel about human life * * * etc.', is relating more closely to Godness than a man who says: 'I wonder if they'll send me overseas: I always did want to travel * * *.'" (GX 32, p. 12). Here we have a clear picture of refraining from military service because of Godness. This is a duty higher or superior to those arising from any human relation. Many more superior duties are shown in Form 150 (GX 24), and the 43 page statement (GX 32). See also the reference in the opinion below as to respondent's acceptance of the order of the universe, and that taking human life is incompatible with acceptance which sees in all humanity Godness—the quality of having been created by the Ultimate Cause (Pn 16, 17). This shows respondent's superior duties to his Creator not to take human life, because he had accepted the Creator's order of the universe.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Dated, April 9, 1964.

HERMAN ADLERSTEIN,
Counsel for Respondent.